

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HONN DAVID SOK,

Defendant-Appellant.

---

UNPUBLISHED

October 12, 2004

No. 249057

Ottawa Circuit Court

LC No. 02-026585-FC

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to imprisonment for two years for the felony-firearm conviction, to be followed by concurrent terms of 9 to 20 years for the armed robbery conviction and 2 to 4 years for the felonious assault conviction. Defendant appeals as of right. We affirm.

Defendant first argues that there is insufficient evidence to establish that he was the perpetrator. We review de novo a claim regarding the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The test for determining whether sufficient evidence has been presented to sustain a conviction is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). All reasonable inferences and credibility choices should be made in support of the jury verdict. *Id.* at 400.

Defendant's argument on appeal is limited to challenging the sufficiency of the evidence regarding defendant's identity as the perpetrator. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). According to defendant, he presented an alibi defense which established that he could not have been present at the place and time that the victim was robbed and assaulted. At trial, defendant claimed that he was with his brother, Anthony Sok, at the time of the offenses. Anthony's testimony was corroborative of this statement.

But in direct contradiction to defendant's and Anthony Sok's testimony, the victim identified defendant as the perpetrator both before and during trial. Before trial, the victim identified defendant as the perpetrator from a photographic array containing six photographs. In

addition, the victim identified defendant as the perpetrator while watching a videotape of the Cambodian Thanksgiving party that she and defendant both attended two days before she was robbed. The victim told her husband that she was one hundred percent certain that defendant was the perpetrator. The victim also told her husband and Deputy Brent Converse that the perpetrator, like defendant, was Asian, spoke Cambodian, and had a mole or black mark on his face. And, at trial, the victim identified defendant as the perpetrator.

Notwithstanding defendant's and Anthony Sok's testimony, the victim's identification of defendant is sufficient to establish defendant's identity as the perpetrator. "[P]ositive identification by witnesses may be sufficient to support a conviction of a crime." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "The credibility of identification testimony is a question for the trier of fact that [this Court does] not resolve anew." *Id.* The fact that the jury found defendant guilty indicates that the jury weighed the evidence, rejected defendant's and Anthony Sok's alibi testimony, and found the victim's identification of defendant as the perpetrator to be more credible than defendant's and Anthony's testimony. It is the jury's function, not the function of this Court, to determine the weight of evidence and the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). In light of the victim's identification of defendant, there was sufficient evidence to establish defendant's identity as the perpetrator.

Defendant next argues that the trial court erred in denying defendant's motion to suppress the victim's identification of defendant from a photographic array. "[T]he trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.*

A photographic identification procedure violates a defendant's right to due process of law when, in light of the totality of the circumstances, it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *Id.* at 302. A photographic array is generally not considered suggestive if "it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification." *Id.* at 304, quoting Sobel, *Eyewitness Identification*, § 5.3(a), pp 5-9 to 5-10. "Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Furthermore, "[p]hysical differences generally relate only to the weight of an identification and not to its admissibility." *Id.*

According to defendant, who is Cambodian, the photographic array shown to the victim was impermissibly suggestive because only two of the six photographs in the array depicted Cambodians, while the other four depicted Laotians who have lighter skin than Cambodians, and because defendant had a distinctive mole on his left cheek and none of the other individuals in the photographs had identifying marks on their faces. We have examined the photographic array and we disagree with defendant's contention that the lightness or darkness of the skin of the individuals depicted in the photographs renders the photographic array impermissibly suggestive. Although the skin tones of the individuals are not all identical, they do not render the array impermissibly suggestive. Moreover, the apparent lightness of some of the individuals may be due to the quality of the photographs. Furthermore, the photo lineup was not impermissibly

suggestive because defendant has a mole on his left cheek, while none of the other individuals in the photo array had distinguishing marks on their faces. The mole on defendant's left cheek, as depicted in the photo of defendant, is very light and not glaringly obvious. We concur with the trial court's characterization of defendant's facial mole as being "de minimis." Overall, the physical differences among the lineup participants that did exist were minor and did not substantially distinguish the defendant from the other lineup participants. We find no clear error in the trial court's admission of the pre-trial identification.

We also reject defendant's suggestion that the trial court should have required the victim to identify him in a corporeal lineup rather than by a photographic array. The use of a photographic array rather than a corporeal line-up is permissible if "[t]here [is an] insufficient number of persons available with defendant's physical characteristics." *People v Anderson*, 389 Mich 155, 187 n 22; 205 NW2d 461 (1973), overruled on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). In this case, Detective Blakely made substantial efforts to conduct a corporeal lineup, but was unable to do so because of the lack of individuals with physical characteristics similar to those of defendant. "There is no authority that requires the police to make endless efforts to attempt to arrange a lineup." *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). Under the circumstances, we find that the use of a photographic array rather than a corporeal lineup in this case was permissible.

Defendant next argues that he was denied his constitutional right to a fair and impartial trial when the jury foreman engaged in a conversation with Detective Blakely during a break in the proceedings. Because defendant failed to raise the alleged constitutional error below, we review this issue for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763. Under the third requirement, a showing of prejudice is necessary. A defendant has been prejudiced if "the error affected the outcome of the lower court proceedings." *Id.*

In support of his contention that the jury foreman spoke with Detective Blakely, defendant provides three nearly identical affidavits, two from his brothers and the other from one of his brother's girlfriend, in which the affiants assert that they saw the jury foreman speaking with Detective Blakely. The affidavits are silent regarding the content of the alleged conversation between the foreman and Detective Blakely. If Detective Blakely did in fact converse with the jury foreman, plain error occurred because Detective Blakely was a witness in the case, and the trial court specifically instructed the jury not to "talk to the defendant, the lawyers or the witnesses about anything at all, even if it has nothing to do with the case." Conduct violating the trial court's instructions is clearly and obviously error. *Id.* However, given the lack of information regarding the content of any alleged conversation, any error does not require reversal because defendant cannot show how he was prejudiced.<sup>1</sup>

---

<sup>1</sup> We denied defendant's suggestion to remand for a hearing to determine the nature of the content of any alleged conversation between Detective Blakely and the jury foreman pursuant to an order dated May 28, 2004.

Defendant next argues that prosecutorial misconduct deprived him of his constitutional right to a fair trial. “We generally review de novo allegations of prosecutorial misconduct.” *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, defendant failed to object to the alleged prosecutorial misconduct; therefore, our review is for plain error that affected defendant’s substantial rights. *Id.*

According to defendant, the prosecutor’s comments referring to two police witnesses’ years of service were improper because they improperly bolstered the credibility of the witnesses and tended to encourage the jury to believe the testimony of the detectives solely based on the fact that they were policemen. A “prosecutor may not attempt to place the prestige of his office, or that of the police, behind a contention that the defendant is guilty.” *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). And the prosecutor is also not permitted to vouch for the credibility or truthfulness of a witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, it is not improper for the prosecutor to comment on the credibility of a witness. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992).

The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, the officers’ years of service was not utilized to support the prosecution’s contention that defendant was guilty. It is evident that the prosecutor was not vouching for the officers’ credibility, but rather encouraging the jury to evaluate the officers’ credibility and apparent lack of motive to lie. Furthermore, the prosecutor’s reference to Detective Blakely’s years of service during rebuttal closing argument responded to credibility issues regarding the officer initially raised by the defense. Even “improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense.” *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

Defendant finally argues that defense counsel was ineffective in failing to object when Detective Blakely referred four times during his testimony to a homicide investigation unrelated to defendant. Because defendant did not move for an evidentiary hearing or new trial based on ineffective assistance of counsel in the trial court, our review is limited to mistakes apparent on the record. *Noble, supra* at 661. According to defendant, defense counsel’s failure to object was prejudicial because the jury may have interpreted Detective Blakely’s references to the homicide as meaning defendant was involved in that homicide. We disagree. Detective Blakely’s comments did not suggest in any way that defendant was involved with a homicide, but rather clearly explained why blood analysis was not done in this case—because due to its backlog, the crime lab was only doing analyses on high priority cases such as homicide and rape. Defense counsel does not render ineffective assistance of counsel by failing to make a meritless objection. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Affirmed.

/s/ Janet T. Neff  
/s/ Michael R. Smolenski  
/s/ Bill Schuette